UNITED STATES
v.
ERNEST F. DIVEN AND RICHARD J. T. ANDERSON

IBLA 77-283 Decided October 25, 1977

Appeal from a decision of Administrative Law Judge Michael L. Morehouse, declaring four placer mining claims null and void. I 5220.

Affirmed.

1. Administrative Authority: Generally--Mining Claims: Contests--Mining Claims: Determination of Validity--Secretary of the Interior

The Secretary of the Interior has the authority to determine the validity of mining claims on any public lands of the United States, including lands within the National Forest System, after adequate notice and opportunity for hearing. A mining claim contest initiated under the authority of the Secretary of the Interior may be prosecuted by counsel employed by the Department of Agriculture acting on behalf of the Forest Service where such action is in accordance with a Memorandum of Understanding between the agencies.

2. Administrative Procedure: Administrative Law Judges--Administrative Procedure: Decisions--Mining Claims: Determination of Validity--Mining Claims: Hearings

A mining claim will be declared null and void where the Board's de novo review of the evidence submitted at a hearing, held in accordance with the provisions of the Administrative Procedure Act and presided

over by an Administrative Law Judge qualified under the Act, establishes that the claimant has not satisfied the requirements of discovery, and there was no error in the conduct of the proceeding.

3. Administrative Procedure: Hearings--Mining Claims: Hearings

The Government has established a prima facie case when a mineral examiner testifies that he has examined a mining claim and has found the mineral values insufficient to support a finding of discovery.

4. Mining Claims: Discovery: Generally

The fact that some minerals exist which might justify further exploration on the claim is insufficient to show a valuable mineral deposit.

5. Mining Claims: Discovery: Generally

In applying the prudent man test of discovery, the cost of extraction, processing and transportation to market of the recovered mineral must be considered because these costs bear on whether a person of ordinary prudence would be justified in the further expenditure of his time and means to develop a valuable mine.

6. Mining Claims: Contests--National Environmental Policy Act of 1969

It is not necessary for the Government to prepare an environmental impact statement before issuing a complaint in a mining claim contest, as the determination of the validity of a mining claim is not a "major Federal action" within the ambit of section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (1970).

APPEARANCES: Jeffrey R. Christenson, Esq., Anderson, Kaufman, Anderson & Ringert, Boise, Idaho, for appellants; Erol R. Benson, Esq., Office of the General Counsel, U.S. Department of Agriculture, Ogden, Utah, for appellee.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

This is an appeal from a decision dated March 14, 1977, by Administrative Law Judge Michael L. Morehouse, which declared the Florence Nos. 1, 2, 3 and 4 Placer Mining Claims (also known as the Meadow Creek Placers) null and void for lack of discovery of a valuable mineral deposit.

The claims, encompassing approximately 620 acres, were originally located on July 22, 1926, by contestees' predecessor in interest. They are situated in section 12, T. 5 N., R. 6 E., and sections 7, 8 and 17, T. 5 N., R. 7 E., Boise Meridian, Boise County, Idaho.

On January 18, 1973, the Bureau of Land Management initiated contest proceedings by filing a complaint charging that:

> 1. There are not disclosed within the boundaries of the Florence Nos. 1, 2, 3 and 4 placer claims minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.
>
> 2. The land embraced within the subject claims is nonmineral in character.
>
> 3. The subject claims are not held in good faith for bona fide mining purposes.

An evidentiary hearing was conducted on October 5, 1976, in Boise, Idaho. The salient testimony of the two major witnesses is summarized as follows in the Judge's decision:

> Mr. Vernon T. Dow, a retired Forest Service mining engineer of considerable experience, testified that he has made four examinations of the claims. He first examined the claims on September 19, 1970, in the company of Mr. Ernest Diven, now deceased, and at that time took ten samples at places indicated by Mr. Diven. On his third examination he was accompanied by Mr. Eugene Anderson and Mr. Diven and took two other samples. The twelve samples were assayed (Exs. G-4 and G-5) and three showed values of approximately $1.00, $.61, and $.92 per cubic yard calculated at gold values at the time of the hearing. The remainder showed negligible values. At the area on the claims where the highest values were obtained, the bedrock was rising toward the surface, thus limiting the amount of gold-bearing gravel. It was Mr. Dow's opinion when taking into consideration the costs of handling the material and other mining costs in addition to his knowledge of

> the geology of the area that a prudent man could not make a paying mine from any of the gravels that were left in the creek channel on these claims.
>
> * * * * * * *
>
> Mr. Carl Baker, an experienced practical miner, * * * sank a number of shafts on the property and took samples which showed values at today's prices of $.9, $.38, $.11, $.19, $1.06, $.09, $.75, and $.21 per cubic yard. It was his opinion there is a pay streak running from one end of the property to the other meandering somewhat in the deeper ground in the meadows, and that an owner of the property could go in with a small outfit starting at the lower end and find the pay streak, following it clear through and could make a profitable operation.
>
> * * * * * * *
>
> However, in addition he stated that he did not consider the costs involved in complying with the State Dredging Placer Mining Act nor did he take labor costs into consideration. In fact, Mr. Baker stated in answer to the question whether he had figured for wages in reaching the opinion regarding profitability:
>
> > Well, I haven't computed any figures.
> >
> > In fact, it is not a big deal up there. That is for sure. With big equipment and a number of men, it would operate at a loss. There is no question about that.
> >
> > If a man owned it or even had some equipment and wanted to go in there with a minimum amount of help, he could. (Tr. 100)

The Judge concluded that the evidence was too speculative to support a valid mining claim and therefore declared the subject claims null and void. We are in agreement with the Judge's conclusions and adopt them as our own. We now address ourselves to the assignments of error raised in the appeal.

[1] The first point raised by appellants is that the Forest Service has no authority to initiate contests of mining claims, which are wholly under the jurisdiction of the Department of the Interior,

and the Administrative Law Judge has no authority to rule on such contests. This point was raised at the hearing by motion, and the Judge correctly denied the motion.

The authority of the Secretary of the Interior over public lands and minerals was succinctly described by the Supreme Court in Cameron v. United States, 252 U.S. 450, 459-60 (1920):

> The general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved.

The hearing procedure used by the Department of the Interior for mining claim contests conforms to the Administrative Procedure Act, 5 U.S.C. § 551 et seq., as amended (1970). United States v. O'Leary, 66 I.D. 17 (1959). See Adams v. United States, 318 F.2d 861 (9th Cir. 1963).

The Department's rules of practice, 43 CFR 4.451-1, provide that the Government may initiate contests for any cause affecting the legality or validity of any mining claim. Although BLM will initiate a contest against a mining claim by issuing a complaint, the request for such action may come from any Federal agency which has Federal public lands under its jurisdiction encumbered by unpatented mining claims.

When lands within national forests are not valuable for their mineral deposits, the Forest Service is entitled to the free and unrestricted possession and control of the lands in order to administer them properly as the law directs. Accordingly, if the Department of Agriculture determines that it has an administrative need to ascertain its right to certain lands upon which mining claims are located, then it is entitled to have that right adjudicated, and such duty devolves upon this Department. United States v. Bergdal, 74 I.D. 245, 252 (1967). The initiation of the instant proceeding was recommended by the Forest Service pursuant to the Memorandum of Understanding executed by the Bureau of Land Management and the Forest Service, effective May 3, 1957. VI BLM Manual 3.1 (June 21, 1962). It is proper for the Government to be represented by counsel employed by the Department of Agriculture acting on behalf of the

Forest Service. State of California v. Doria Mining and Engineering Corp., 17 IBLA 380, 387-88 (1974); United States v. Ramsher Mining and Engineering Co., 14 IBLA 32, 36 (1973). See also 43 CFR 1862.4. However, the final determination of the validity of such unpatented mining claims will be made by the Department of the Interior, after notice and opportunity for a hearing. Best v. Humboldt Placer Mining Co. 371 U.S. 334 (1963); U.S. v. Dummar 9 IBLA 308 (1973).

Contestees assert that a prima facie case of lack of discovery was not established. In this vein they argue that the samples taken by the Forest Service examiner were inadequate, duplicative and not representative of the mineral content and character of the lands within the claim. These allegations are not supported by the record which demonstrates a conscientious and diligent sampling procedure by the Forest Service examiner. Also in evidence are assay reports indicating minimal values for the samples submitted by the examiner.

[2] A mining claim will be declared null and void where the Board's de novo review of the evidence submitted at a hearing, held accordance with the provisions of the Administrative Procedure Act and presided over by an Administrative Law Judge qualified under the Act, establishes that the claimant has not satisfied the requirements of discovery, and there was no error in the conduct of the proceeding. United States v. Rigg, 16 IBLA 385, 389 (1974).

[3] As this Board has frequently held, when the government contests a mining claim it has assumed the burden of making a prima facie case that the claim is invalid. United States v. Arizona Mining and Refining Company, Inc., 27 IBLA 99 (1976); United States v. Reynders, 26 IBLA 131 (1976); United States v. Gold Placers, Inc., 25 IBLA 368 (1976). A prima facie case is established where a government mineral examiner gives his expert opinion that he examined the claim and found insufficient values to support the assertion that a valuable mineral deposit has been discovered. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Reynders, supra; United States v. Ramsey, 14 IBLA 152 (1974). Once the government has established a prima facie case, the burden shifts to the contestee to show by a preponderance of the evidence that a valuable mineral deposit was discovered on the claim. United States v. Johnson, 16 IBLA 234, 242 (1974); approved, Johnson v. Morton, Civ. No. LV 74-158 (D. Nev.); Magistrate's Op. (September 8, 1977); United States v. Zweifel, 508 F.2d 1150 (10th Cir.) cert. denied, 423 U.S. 829 (1975); United States v. Springer, 491 F.2d 239 (9th Cir.), cert. denied, 419 U.S. 234 (1974).

How did the contestees satisfy this burden? Carl Baker, a retired placer miner operator, testified to his examination of the subject placer claims in 1939 (Exh. R-1). The gold values recovered

by his sampling were converted from the figure of $35 per ounce, used in his report, to $114 per ounce, and showed a range in value from less than 10 cents per cubic yard to $1.95. Of the 10 samples Baker reported, only 2 showed a current value in excess of $1 per yard, while 6 showed values less than 40 cents per cubic yard. Baker gave his opinion, without demonstrating its existence, that a pay zone existed in the claims and that a "small outfit" could probably follow the pay streak through the claims and make a profitable operation, but only if the personal labor and equipment costs were not included. As the Judge held, this testimony is highly speculative. We find that evidence from the contestees did not preponderate over the prima facie case of the Government.

[4] Contestees further assign as error that the judge failed to consider the value of rare earth elements and black sand on the claims. However, no discovery of these substances was claimed initially and the fact that some minerals may exist which might justify further exploration is insufficient. United States v. Taylor, 25 IBLA 21, 25 (1976); United States v. McClurg, 31 IBLA 8 (1977). Indeed, contestees gave no evidence either as to quantity or quality of any rare earth elements which may be present within the claims.

[5] Contestees further allege that certain documentary evidence, not considered by the Judge, indicates a valid discovery sufficient to warrant a prudent man in the further expenditure of his labor and means with a reasonable expectation of developing a paying mine. The documents referred to (Exhibits R-5 and R-6) are reports of mining engineers on the claims at issue. Exhibit R-5 was compiled in 1937 and Exhibit R-6 is undated. The authors of the reports were not available to testify. Since the reports were not subject to cross-examination, the data contained therein could not be meaningfully evaluated in light of recovery costs and related expenses obtaining at the time of the hearing.

The prudent man test requires the consideration of the cost of extraction, processing, and transportation of the mineral to be recovered. United States v. Coleman, 390 U.S. 599 (1968); United States v. Converse, 72 I.D. 141 (1965), aff'd Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States v. Heard, 18 IBLA 43 (1974); United States v. Garner, 30 IBLA 42 (1977). The record contains no pertinent data on which a man of ordinary prudence could rely were he to consider further expenditure of labor and means with a reasonable prospect of success in developing a paying operation on these claims. We find that the judge did not err in ignoring Exhibits R-5 and R-6.

[6] Appellants contend that the Forest Service should have prepared an environmental impact statement (EIS) before initiating action

against their mining claims, asserting that cancellation of the claims is a "major Federal action" within the ambit of section 102 of the National Environmental Policy Act of 1969, (NEPA), 42 U.S.C. § 4332 (1970). We do not agree. This Board held in United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 80 I.D. 538 (1973), that "it is not necessary for the Government to prepare an EIS before issuing a patent to a mining claim as the patenting of a mining claim is not a major Federal action" within the ambit of section 102 of NEPA, supra. See United States v. Pittsburgh Pacific Co., 30 IBLA 388, 84 I.D. ____ (1977). Similarly, we hold that the cancellation of a mining claim is not a "major Federal action," under NEPA. Moreover, in Township of Dover v. U.S. Postal Service, No. 76-789 (D. N.J., March 16, 1977), the Court held that an EIS is not required when the primary impacts of the Government's action are socio-economic rather than ecological. We cannot recognize any deleterious impact to the environment because of the cancellation of a mining claim.

Contestees' remaining assignments of error are wholly unrelated to the issue herein, and therefore merit no additional discussion.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Richard L. Morehouse declaring null and void Florence Nos. 1, 2, 3 and 4 Placer mining claims is affirmed.

_____
Anne Poindexter Lewis
Administrative Judge

We concur:

_____
Douglas E. Henriques
Administrative Judge

_____
Martin Ritvo
Administrative Judge